U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 January 2006

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In the Matter of:

LUCY ROARK, widow of
CALVIN ROARK, deceased
Claimant,

v. **Case No. 2004-BLA-05901**

UNITED STATES STEEL CORP.,
Employer, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

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Appearances:

Joseph Wolfe, Esq., Wolfe, Williamson and Rutherford, Norton, VA
For Claimant

Howard G. Salisbury, Jr., Kay Casto & Chaney PLLC, Charleston, WV
For Employer

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a survivor's claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Lucy M. Roark ("Claimant") on June 6, 2002 based upon the death of her husband Calvin L. Roark ("Miner"). The putative responsible operator is U.S. Steel Corporation ("Employer").

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also

applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003, solely for the purposes of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, except as limited below in view of the new evidentiary limitations. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant Lucy Roark filed the instant claim for survivor's benefits (hereafter "Widow's claim") on June 6, 2002, based upon the death of her husband, Calvin Roark, on July 4, 1994. (DX 3). The District Director initially concluded that based on the current evidence, the Claimant would not be entitled to benefits and the Employer was the responsible operator. (DX 13). Thereafter, on November 7, 2003 the District Director issued a Proposed Decision and Order denying benefits. (DX 16). The District Director found that the Miner had thirty years of coal mine experience, that the written claim was timely filed, that the Miner contracted pneumoconiosis as a result of his coal mine work, that such disease caused, at least in part, by coal mine work, that such disease did not cause the Miner's death, that Claimant was surviving eligible widow, that Claimant was a dependent of Miner at the time of death, and that Employer was the responsible operator. *Id.*

Claimant requested a formal hearing with the Office of Administrative Law Judges on November 17, 2003. (DX 17). The case was transferred on February 26, 2004, and the only contested issue in this case is whether the miner's death was due to pneumoconiosis. (DX 19). No hearing was held in the above-captioned matter, because a Motion for Hearing on the Record was filed by Claimant on March 23, 2005. I issued an Order Canceling Hearing and Providing for Hearing on the Record on March 23, 2005, which granted the request to have the hearing conducted on the written record and indicated that the record would consist of Director's Exhibits ["DX"] 1 through 21 as supplemented by the parties. In addition, the Order requested parties to submit prehearing statements and Evidence Summary forms by April 25, 2005 and closing briefs by May 25, 2005.

Thereafter, Employer submitted an Evidence Summary Form on April 26, 2005, having previously submitted the medical report of Dr. Castle by letter dated March 24, 2005 designating it as Employer's Exhibit Number 1 (EX 1). No closing brief or Evidence Summary Form was submitted on behalf of the Claimant; however Claimant previously submitted the medical report of Dr. Perper, which is designated as Claimant's Exhibit Number 1 (CX 1). Both exhibits are

[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

accepted as timely, and DX 1 through 21, CX 1, and EX 1 are admitted into evidence. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The only issue listed contested by the Director and the Employer is whether the Miner's death was due to pneumoconiosis (DX 19).

Medical Evidence

The medical evidence submitted in connection with the Widow's claim consists of the following:

(1) Medical report by Dr. James R. Castle dated February 24, 2005 (Employer's Initial) (EX 1);

(2) Medical report by Dr. Joshua Perper on August 8, 2004 (Claimant's Initial) (CX 1);

(3) Medical treatment records and report from Dr. Anil B. Agarwal (DX 8); and

(4) Death certificate dated July 7, 1994 by Dr. R. Jabour (DX 7).

In addition, the medical evidence regarding the living miner's claim is also in the record.[3]

Background and Employment History

There was no formal hearing in this matter, because Claimant requested a hearing on the record.

Claimant is the widow of the deceased miner, Calvin L. Roark. (DX 3). The Miner died on July 4, 1994 at the age of 67. *Id.* No autopsy was performed. *Id.* During the Miner's lifetime, he filed for black lung benefits on December 1, 1980. (DX 1). At the time he filed his first claim, in 1980, he was disabled and no longer working in the mines. (DX 1). He was initially granted benefits by the Deputy Commissioner on October 10, 1985; however, Administrative Law Judge Robert Amery reversed the initial finding and denied the claim on October 4, 1988. *Id*. The Board affirmed in part and vacated in part Judge Amery's finding on September 11, 1992. *Id.* On remand, Judge Amery reconsidered the issue of total disability and upheld his initial denial of benefits. *Id.*

In connection with his December 1980 claim, the Miner testified at a March 17, 1998 hearing before Judge Amery. (DX 1). He testified that he was born in 1926, and he has been

[3] The admissibility of the medical records from the living miner's claim will be discussed below under the evidentiary limitations section.

receiving social security disability since 1982. (Tr. 9-11).[4] In addition, he received State benefits for ten percent disability caused by silicosis. *Id.* at 11. He testified that he had thirty four years of coal mining experience. *Id.* at 12. He stated that his last employer was U.S. Steel, for which he had worked since 1948, and he retired on February 8, 1980. *Id.* He testified that he was forced to retire before he was eligible for his pension because of his breathing problems. *Id.* at 15-16.

The Miner testified that he was stationary equipment operator during his last four years of employment. *Id.* As a stationary equipment operator, he continuously walked and checked a 64 dicer table inside the tipple. *Id.* at 13. He was required to walk from the fourth to the sixth floor. *Id.* He described a dicer table as a table that is twenty feet long and ten feet wide, where all coal under eighth of inch came into. *Id.* at 13-14. He also stated that he used tools to change the pipes and overhaul gears with jacks and wrenches, and the work required a lot of pulling and tugging. *Id.* at 14. During his thirty-four years of coal mining work, he worked twenty-four years above ground and ten years underground. (Tr. 21).

He further testified that Dr. Agarwal was his treating physician, and he was currently on medication for his breathing condition. (Tr. 17).

Discussion and Analysis

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001, including survivor's claims. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3)*, citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be

[4] The transcript for the 1998 hearing is referenced as "Tr." followed by the corresponding page number.

admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* As the Board noted, the regulations specifically allow evidence from a prior claim to be considered in connection with a later claim, so that a determination may be made whether there has been a material change in conditions since the time of the prior claim. 20 C.F.R. §725.309(d)(1). However, there is no such provision applicable to survivor's claims that would allow consideration of the evidence developed in the miner's claims, absent a finding of good cause.

Consistent with the above limitations and the Board's decision in *Dempsey*, other administrative law judges have generally excluded evidence developed in connection with a miner's claim from consideration in a surviving spouse's claim to the extent that the limitations have been exceeded. *See Brewster v. Consolidation Coal Co.,* 2004-BLA-05361 (ALJ Solomon Feb. 16, 2005) (finding evidence from miner's claim unduly repetitious and finding no good cause to exceed limitations); *Duncan v. West Coal Corp.*, 2004-BLA-05355 (ALJ Miller Jan. 18, 2005) (noting strong policy reasons for excluding evidence from a miner's claim in a survivor's claim, which is "an independent claim subject to independent analysis"); *Howard v. P & C Mining Co.,* 2003-BLA-05436 (ALJ Kane Dec. 29, 2004) (excluding excess evidence except for treatment records and prohibiting rebuttal to treatment records); *Griffin v. Island Coal Company,* 2003-BLA-5503 (ALJ Phalen July 22, 2004) (excluding excess reports, excess test results, and deposition testimony relying upon inadmissible evidence). However, Administrative Law Judge Robert L. Hillyard found good cause for consolidating a miner's claim with a survivor's claim and for exceeding the evidentiary limitations in the consolidated claims, in *Clark v. Peabody Coal Company,* 2002-BLA-05114 (ALJ Hillyard, Nov. 30, 2004).

There was no hearing held in the instant case. Director's Exhibit ("DX") 1 through 21 were admitted into evidence in the March 25, 2005 Order. The Director's Exhibits included the medical evidence from the living Miner's claims as well as the evidence submitted in connection with the Widow's claim that is now before me. The exhibits included numerous x-rays, blood gas studies, pulmonary function tests, and medical reports in excess of the evidentiary limitations.[5] However, the District Director's proposed decision was based on the medical records submitted in the survivor's claim only and consideration was not given to the medical evidence from the living miner's claims. (DX 31). In order for these medical records to be considered (except for clinical or hospital records), the parties must make a showing of good cause to exceed the evidentiary limitations. The parties have made no showing of good cause to support consideration of the presumptively excluded medical evidence from the Miner's claim. Therefore, I will only consider the medical evidence submitted under the survivor's claim, together with clinical or hospital records from the Miner's claim, if any.

Additionally, Employer submitted the medical report of Dr. Castle (EX 1), and Claimant submitted the medical report of. Dr. Perper (CX 1). In view of the authority cited above, a

[5] Specifically, the living miner's claim included fourteen x-rays and eight medical reports.

problem arises related to the submitted medical reports of Drs. Perper and Castle, because both reports reference the medical evidence relating to the Miner's claim that is not admissible. Both subsection (a)(2)(i) (relating to evidence admissible on behalf of a claimant) and (a)(3)(i) (relating to evidence admissible on behalf of a responsible operator) provide the following:

> . . . Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph [providing the limitations] or paragraph (a)(4) of this section [allowing admission of "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease" notwithstanding the limitations in (a)(2) and (a)(3)]. . . .

As *Dempsey* noted, the section does not state what is to be done with a medical report that is not in compliance with this requirement and it would be within my discretion to exclude such a report if the physician's opinion were "inexplicably intertwined" with the inadmissible evidence. However, I will consider each of these medical reports to the extent to which the impermissible evidence is not inextricably intertwined with the expert's medical opinion.

Merits of the Claim

To prevail in a survivor's claim for Black Lung benefits, a Claimant must establish that the miner had pneumoconiosis; that the miner's pneumoconiosis arose out of coal mine employment; and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. A miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, it was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(2). Causation may also be established presumptively, under the presumption relating to complicated pneumoconiosis, set forth at §718.304. 20 C.F.R. §718.205 (c)(3).

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

The only issue presented in this case is whether the miner's death was due to pneumoconiosis. (DX 19).

Death Due to Pneumoconiosis

For this survivor's claim (which was filed after January 1, 1982), the issue of death due to pneumoconiosis is governed by 20 C.F.R. § 718.205(c). As amended, that subsection provides:

> (c) For the purpose of adjudicating survivor's claims

> filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:
>
> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
>
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> (3) Where the presumption set forth at § 718.304 [relating to complicated pneumoconiosis] is applicable.
>
> (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
>
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.205(c) (2001). Subsection (5), added when the regulations were amended, is consistent with existing judicial precedent. Under existing precedent in the Fourth Circuit (and elsewhere), consistent with new subsection (5), any condition that hastens a miner's death is a substantially contributing cause of death. *See Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 757-62 (4th Cir. 1999); *Mancia v. Director, OWCP,* 130 F.3d 579 (3d Cir. 1997); *Grizzle v. Pickands Mather & Co.,* 994 F.2d 1093, 1099 (4th Cir. 1993); *Brown v. Rock Creek Mining Company, Inc.,* 996 F.2d 812, 816 (6th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3rd Cir. 1989). Thus, the standards are the same under the new and old regulations.

Courts that have addressed the issue have held that, even if pneumoconiosis briefly shortened a miner's death, that is sufficient to establish the hastening standard. In *Lukosevicz,* for example, the U.S. Court of Appeals for the Third Circuit found that when a miner died from pancreatic carcinoma, a medical opinion to the effect that his life was briefly shortened by pulmonary anthracosis was sufficient.

At the outset, I note that there is no evidence of complicated pneumoconiosis. Accordingly, Claimant cannot satisfy the requirements of subsection (c)(3) and must establish that the Miner's pneumoconiosis was the direct cause of death under subsection (c)(1) or a substantially contributing cause of death or hastening factor under subsections (c)(2) and (5).

Under §718.205, Claimant can prove that the miner's death was due to pneumoconiosis through competent medical evidence. In this case, the medical evidence consists of medical reports, the death certificate, and treatment records.

Medical Reports. Drs. Castle, Perper, and Agarwal submitted medical reports on the issue of whether the Miner's death was due to pneumoconiosis. The reports are summarized below.

(1) James R. Castle, **MD**, submitted a medical report dated February 24, 2005. He stated that the miner's death was not caused by, contributed to, or hastened in any way by coal mine dust exposure or coal workers' pneumoconiosis ("CWP"). Dr. Castle reviewed and summarized the findings from the death certificate, employment history dated 6/6/02, medical records from Bluefield Community Hospital by Dr. Agarwal, the prior ALJ decision in living miner's claim, and the medical records relating to the living miner's claim.

After reviewing the above documents, he concluded that the Miner did not suffer from coal workers' pneumoconiosis. While recognizing the thirty four years of coal mining work, he stated that it is unlikely that the Miner would have been exposed to any significant amount of silica in his position as station equipment operator. He stated that the miner was a lifelong nonsmoker. However, he stated that another risk factor for the development of pulmonary symptoms is cardiac disease, which the miner possessed together with coronary artery disease, ongoing angina pectoris, and episodic paroxysmal atrial tachycardia.

The report also recognized that the death certificate indicated cause of death as lung cancer, but no other record indicated the details of this diagnosis. Further, he stated that there were no consistent findings of interstitial pulmonary process, such as rales, crackles, or crepitations. Based upon the radiographic reports, ventilatory studies, and arterial blood gases, he concluded that Mr. Roark did not suffer from pneumoconiosis. He further stated that the miner was not totally disabled from CWP but possibly from a cardiovascular disease.

Lastly, the report stated that lung cancer has not been shown to be causally associated with coal mine dust exposure or CWP. However, he agreed that silica was classified as a carcinogen, but he stated that there is no evidence that the miner was exposed to silica.

(2) Joshua Perper, M.D., submitted a medical report dated August 8, 2004. He concluded that the Miner had evidence of simple CWP, causally associated with both the centrilobular emphysema and pulmonary cancer; CWP was the result of thirty to thirty-four years of coal dust exposure; and CWP was a substantial contributory cause of death and hastening factor in the miner's death.

The report recounted the Miner's occupational history of 31 years of coal mining experience and smoking history as life-long non-smoker. Thereafter, the report provided a detailed summary of the Miner's medical records (including medical records from the living miner's claim) under clinical history.

Additionally, the report addressed "medicolegal questions", and stated in part:

- Mr. Roark has more than thirty years of coal dust exposure, history of COPD, symptomatic shortness of breath, combined obstructive and restrictive ventilatory defect, progressive abnormal arterial blood gases and hypoxemia, and radiological evidence to support a finding of CWP.
- Mr. Roark's CWP was a result of his thirty years of coal dust exposure.
- Medical evidence substantiates that CWP can progress and develop after cessation of occupational exposure to coal mine dust.
- The death certificate reports the presence of cancer of the lungs, and for such reason the report discusses the causal relationship of CWP to lung cancer.
- Medical literature has substantiated that exposure to coal dust and CWP has resulted in the development of pulmonary cancer. In late 1997, OSHA classified silica as carcinogenic in humans and warned that workers exposed could contact cancer of the lungs.
- Mr. Roark's CWP substantially contributed to or hastened his death, because he had substantial evidence of CWP and causally associated centrilobular emphysema and pulmonary cancer. CWP is a well recognized cause of mortality. Mr. Roark was a life long non-smoker, and thus the cancer cannot be attributed to cigarette smoking. The CWP and occupational exposure to mixed coal dust containing silica was the cause of the cancer.

(3) Anil B. Agarwal, M.D. the Miner's treating physician, prepared a June 6, 2003 report, in addition to his statements in the medical records (discussed below). In that report, he stated that he treated the Miner, Calvin Roark, Sr., for over ten years, and he was diagnosed with chronic obstructive pulmonary disease ("COPD") and pneumoconiosis. Based upon his recollection of the medical records, Dr. Agarwal stated that the Miner's cause of death was contributed to by pneumoconiosis. However, he did not state a basis for that conclusion.

Factors to be considered when evaluating medical opinions include the reasoning employed by the physicians and the physicians' credentials. *See Millburn Colliery Co. v. Hicks,* 138 F.3d 524, 536 (4th Cir. 1998). A doctor's opinion that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). Further, while a finder of fact may give the opinion of an examining physician "especial consideration" when it is evaluated, one cannot go so far as to "mechanistically" afford such opinion greater weight than that of a non-examining physician. *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998). The opinions of physicians possessing superior credentials may be entitled to additional weight based upon the theory that a physician's credentials are important indicators of the reliability of that physician's opinion, and the credentials of the treating physician as compared with those of the other physicians expressing opinions must therefore be considered in weighing the medical opinion evidence. *Hicks, supra.* Similarly, the report of a non-examining physician cannot be discredited simply because the doctor did not examine the claimant, but the amount of weight given to a medical opinion is a decision left to the finder of fact. *See, e.g., Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51, 1-55 (1996). The new regulation appearing at 20 C.F.R. §718.104(d) allows additional weight to be given to the opinion of a treating physician but requires certain factors, including the nature and duration of the relationship, the frequency of treatment, and the extent of treatment, to be considered.

Although there is no information in the record as to Dr. Agarwal's credentials, the curricula vitae of Drs. Castle and Perper are of record. Dr. Castle is board certified in internal medicine and pulmonary disease and is also a certified "B" reader. Additionally, he has held several academic appointments and published numerous articles in the area of pulmonary medicine. While Dr. Perper holds no board certifications in the area of pulmonary or occupational diseases, he presently serves as a chief medical examiner, and he is board certified in anatomical, surgical, and forensic pathology. Although Dr. Perper has numerous academic appointments and publications, his credentials are in the area of pathology. Based upon the physicians' credentials, I find that Dr. Castle is slightly more qualified to render an opinion on the issue before me in this case, which does not involve the interpretation of any pathological slides or data. Nonetheless, I will consider the content of each report and consider the respective credentials of these physicians while weighing the medical opinions.

Dr. Agarwal's report is conclusory in nature and, notwithstanding his status as treating physician, I do not find his report to be reasoned or documented and therefore it is not entitled to controlling weight under 20 C.F.R. §718.104(d).

I must note that both of the remaining medical reports, by Drs. Perper and Castle, reference inadmissible evidence under the evidentiary limitations. As stated above, all the medical evidence relating to the living miner's claim (apart from clinical or hospital records) is excluded under the evidentiary limitations, unless otherwise admissible, and the two reports summarized the medical records and other evidence from the living miner's claim. However, I do not find that the inclusion of such information renders their reports inadmissible, because the reports cited other admissible information (such as the treatment records and death certificate) to support the stated conclusions and I find cases involving deceased miners to present a special situation. Therefore, I will consider both opinions to the extent they rely upon admissible evidence from the Miner's claim.

The medical report of Dr. Perper was unsupported and inconclusive on the issue of cause of death. Although the report cited medical research to support the connection between pneumoconiosis and pulmonary cancer, Dr. Perper failed to reference the specific factors in the Miner's case that showed the connection. Additionally, the report contained general statements such as "coal workers' pneumoconiosis is a well recognized …cause of significant mortality" without stating objective medical data from the Miner's personal medical history to support that conclusion.

Dr. Perper's report also contained inaccuracies and unsupported assumptions. First, the report stated that the miner had centrilobular emphysema, which is not stated in the Miner's medical records. Secondly, in his conclusion, Dr. Perper stated that "after reviewing the above clinical medical documentation, *autopsy report and autopsy lung and heart histological sections*" when there was no autopsy report in this case. Overall, I find the report of Dr. Perper to be lacking in analysis and to be inaccurate. For the above reasons, the report is given less weight.

Turning to the report by Dr. Castle, I also find that the report failed to thoroughly discuss the cause of death issue. The report stated that there is "no unequivocal data" to indicate that coal mine dust causes lung cancer or that coal workers' pneumoconiosis causes lung cancer. However, in support he has merely noted that "the Internal Agency for Research on Cancer has classified coal dust as a non-carcinogen," but he failed to provide any information about that agency or its role, nor has he provided any documented medical research to support that assertion. Likewise, while the report does not contain inaccurate data, Dr. Castle's analysis is sparse.

In comparing the two reports, I do not find that either physician sufficiently addressed the cause of death issue. Though Dr. Perper cites extensive research on the causal relationship between lung cancer and CWP, he fails to point to specific characteristics to support such finding in the instant case. Dr. Castle's report was also conclusory on the issue without referencing any credible medical research to support his conclusion. Claimant has the burden of proof in establishing that pneumoconiosis was in fact the cause of death or a contributing factor, but she has failed to satisfy that burden through Dr. Perper's report, considered along with Dr. Castle's report. Thus, Claimant failed to establish this element of entitlement through the medical report evidence.

Death Certificate: The death certificate listed cause of death as "cardiopulmonary arrest" due to (or as a consequence of) "lung cancer." No other contributing conditions were listed. The death certificate is the only medical record to mention lung cancer.[6] The document was signed by R. Jabour, MD. (DX 7). Significantly, it does not mention coal worker's pneumoconiosis or COPD. As Claimant has not proven that the Miner's lung cancer was caused by coal mine dust exposure, the death certificate does not assist her in establishing a causal relationship between pneumoconiosis and the Miner's death. Moreover, standing alone, the death certificate is insufficient to prove or disprove cause of death. *See, e.g., Bill Branch Coal Corp. v. Sparks,* 213 F.3d 186 (4th Cir. 2000) (bald conclusion on death certificate insufficient to establish pneumoconiosis contributed to death from myocardial infarction).

Dr. Agarwal's Treatment Records (DX 46): The treatment records (in addition to the June 6, 2003 report, discussed above) stated in relevant part:

> **October 11, 1980**: (discharge report). The Miner's chief complaint was fast heart beat and chest pain, but he also complained of shortness of breath on exertion. Under history, hypertension, COPD, paroxysmal supraventricular tachycardia are listed. The physical examination showed normal carotid pulses and the lungs were clear. Paroxysmal supraventricular tachycardia, hypertension, coronary artery disease and COPD were listed as impressions.
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> **May 31, 1988**: (pre-operative evaluation). The report mentioned a history of coronary artery disease with chronic angina pectoris and COPD. The physical examination revealed clear lungs with slightly diminished breath sounds. The heart was regular with

[6] A list of physicians provided by the Claimant (appearing in DX 8) reflects that the Miner was treated by numerous other physicians, including an oncologist, Dr. Chambers. Pathologists at Princeton Community Hospital Laboratory, Princeton WV are also listed. However, those records have not been obtained.

no murmur, gallop, rub or click noted. The impression listed rhinophyma, skin lesion of right side of face, hypertension, chronic obstructive pulmonary disease, and coronary artery disease with chronic angina and PAT [paroxysmal atrial tachycardia].

September 26, 1988: (pre-operative evaluation). COPD is listed, and no history of diabetes, TB, cancer or stroke is listed. Miner is listed as a non-smoker. The physical examination showed no tenderness in the chest, and the lung sounds were slightly diminished. Heart rhythms were regular. History of foot surgery for tumor 17 years ago (three times). Early cirrhosis of the liver was attributed to exposure to wood alcohol at work. The impression listed hypertension, paroxysmal atrial tachycardia, chronic obstructive pulmonary disease, and repair of nose deformity.

February 22, 1993: (pre-op consultation). Miner is listed with COPD and no alcohol or smoking history. He complained of shortness of breath on any activity. The physical examination revealed slightly diminished breath sounds with mild wheezes and regular heart sounds. The impression was hypertension, ASHD [arteriosclerotic heart disease], PAT [paroxysmal atrial tachycardia], angina, diabetes, enlarged prostate, and rhinophyma (due to rosacea).

December 12-15, 1993: (admission history & physical and discharge summary). The chief complaint was chest pain. The admission record stated that the Miner had diabetes, angina, hypertension, COPD, osteoarthritis and an enlarged prostate. It further stated that there was no history of stroke, TB, or cancer. On discharge, it was noted that a portable chest x-ray showed a prominent cardiac silhouette but was otherwise normal. The discharge diagnoses were unstable angina pectoris, coronary artery disease, hypertension, noninsulin dependent diabetes mellitus, history of paroxysmal atrial tachycardia, and history of occupational cirrhosis.

(DX 8). Dr. Agarwal's office records are also of record; the most recent one, dated April 13, 1994, merely recounts complaints of stomach pain and nausea (for which antibiotics had been prescribed) and lists diagnoses of coronary artery disease (CAD) and hypertension (HTN). *Id.*

After reviewing the treatment records, I do not find that these records establish that pneumoconiosis was the cause of death. As noted above, Dr. Agarwal's June 6, 2003 letter contained no analysis and simply relied upon "his recollection of the medical records" without citing specific medical evidence. The treatment records provided do not, however, supply that which is lacking in Dr. Agarwal's report as they are not relevant to the cause of death issue. These records do not mention coal worker's pneumoconiosis or discuss the cause of death. Although COPD is listed as a diagnosis in those records, there is no discussion of its etiology or severity, nor is there any discussion of how COPD impacted the Miner's pulmonary condition or may have contributed to or hastened his death. Therefore, the treatment records also fail to assist the Claimant in proving by a preponderance of the evidence that the Miner's death was due to pneumoconiosis.

Assessment of All of Medical Evidence. Based upon consideration of all of the medical evidence pertinent to the issue, I find that the Claimant has not sustained her burden of proving

that the Miner's death was due to pneumoconiosis. Claimant has merely established the possibility of such a causal relationship.

Conclusion

Inasmuch as the Claimant cannot establish that the Miner's death was due to pneumoconiosis, this claim fails because a requisite condition of entitlement has not been met. Therefore, the Claimant is not entitled to the award of benefits.

ORDER

IT IS HEREBY ORDERED that the claim of Lucy Roark for black lung benefits as the surviving spouse of Calvin L. Roark, deceased, be, and hereby is, **DENIED.**

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.